No. 89-1782 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does the unique sovereign status of Indian tribes under the constitution and the federal government's plenary authority over Indian affairs authorize federal court damage suits by tribes against states to vindicate federal rights?

2. Are Native Villages organized under the Indian Reorganization Act and villages whose aboriginal rights were extinguished in exchange for land and money under the Alaska Native Claims Settlement Act recognized tribes for purposes of bringing suit under 28 U.S.C. § 1362?

3. Is there a federal question presented when a state refuses to acknowledge the political status of federally recognized tribes and denies them state benefits by reason of their race?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Respondent Native Village of Noatak, a federally recognized Alaska Native tribe,[1] respectfully requests

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[1] The Native Village of Noatak is a remote Inupiat Eskimo village located in Northwest Alaska above the Arctic Circle, along the Noatak River inland from Kotzebue Sound and the Chukchi Sea.

the Court to refuse the writ of certiorari sought by petitioner Commissioner of the Alaska Department of Community and Regional Affairs.[2]

This controversy arises out of the refusal, until recently, of Alaska's executive branch to deal with Alaska Native villages as "Indian tribes" with powers of local self-government rather than as racially-defined groups. In 1980 the Alaska Legislature, in recognition of the *tribal* status of Native villages, enacted a revenue-sharing statute[3] providing for annual payments of $25,000 to each "Native village government" located in a community which did not have a State-chartered municipal corporation. Alaska Stat. §§ 29.89.010 (1984) and 29.89.050 (1984). The term "Native village government" was defined to include governments reorganized under the 1934 Indian Reorganization Act (25 U.S.C. § 476) ["IRA"],[4] traditional village councils, "paramount chief[s]," or other governing bodies of the tribal villages with which Congress dealt in the Alaska Native Claims Settlement Act ("ANCSA"). Alaska Stat. § 29.89.050 (1984).[5]

In opinions issued in 1981 (Complaint, Exhibits A and B), the Alaska Attorney General disagreed with the Alaska Legislature, concluding that the revenue-sharing statute was unconstitutional. He found that Alaska Native village governments were not politically defined, but were "racially exclusive group[s]" or "racially exclusive organizations" whose status turns solely "upon the racial ancestry of the communities."[6] On this basis the Attorney General opined that providing State aid to tribal governments violated the equal protection clauses of the Fourteenth Amendment and article I, section 1 of the Alaska Constitution.[7] The Attorney General reached this con-

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[2] The district court's initial decision granting respondents' motion for preliminary injunction is unreported and is reproduced in the appendix to this brief, App. A-1. The district court's subsequent judgment and bench ruling dismissing respondents' complaint on jurisdictional grounds are reproduced as Appendix A to the petition for certiorari, Pet. App. A-1 - A-14. The initial opinion of the Ninth Circuit in this case is reported at 872 F.2d 1384 (March 30, 1989). The order withdrawing this opinion, and opinion on rehearing, are reported at 896 F.2d 1157 (February 12, 1990), and reproduced at Pet. App. B at B-1 - B-27. The Commissioner's petition for rehearing and suggestion for rehearing *en banc* were denied, with no judge of the Ninth Circuit voting for *en banc* reconsideration. Pet. App. B 1-4.

[3] The statute is set forth in the district court's preliminary injunction filed March 3, 1986, which is reproduced in the appendix hereto. *See* App. A-1 at A-2.

[4] The Native Village of Noatak has a government reorganized under the IRA; Circle Village has a traditional council form of government. Both governments are situated in villages which are not incorporated as State-chartered municipalities. Both villages are named in section 11(b)(1) of ANCSA as beneficiaries of the Native claims settlement act. 43 U.S.C. § 1610.

[5] ANCSA settled tribal land claims in Alaska by, inter alia, the payment of nearly one billion dollars and the recognition of fee title to over 44 million acres in exchange for the extinguishment of aboriginal title to the rest of Alaska. 43 U.S.C. §§ 1601-1628.

[6] As District Judge Holland noted in his preliminary injunction, "the State has consistently characterized the 'Native village government' rubric of [the statute] as being a racially tainted term. The Court has substantial doubts that this characterization is appropriate." App. A-1 at A-15.

[7] The Attorney General also concluded that equal protection principles were violated because villages with tribal governments were so similar to villages without tribal governments as to be constitutionally indistinguishable; and that the program violated

clusion notwithstanding this Court's holding that Indian Tribes are quasi-sovereign entities, not defined by race but by political affiliation. *See e.g., Morton v. Mancari*, 417 U.S. 535, 551-555 (1974); *United States v. Antelope*, 430 U.S. 641, 646 (1977).

The Commissioner of Community and Regional Affairs acted on the Attorney General's advice by administratively expanding the program beyond its statutory scope to provide revenue sharing to all unincorporated communities rather than just those with tribal governments.[8] As a result Noatak's pro rata share of the fund appropriated by the legislature was diminished. In 1985, the Legislature amended the revenue-sharing statute (effective commencing with the 1987 state fiscal year) to conform to the administrative expansion of the program, thus statutorily providing aid to all unincorporated communities regardless of the presence of a Native village government. Alaska Stat. § 29.60.140 (1986).

Respondents brought this action in September 1985 to challenge the State Executive's policy and practice of treating tribal governments as racial groups rather

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the public-purpose and local-government provisions of the Alaska Constitution.

[8] Petitioner has contended throughout the litigation, as he does here (Pet. at 2-3 n.1), that no village suffered as a result of his decision to administratively expand the program, because the Legislature funded the expanded program as fully as it would have funded the program limited to Native village governments. Respondents allege, however, that their entitlements were diminished by petitioner's action. This factual dispute has not been resolved, and both the district court (Pet. App. A at A-11) and the Ninth Circuit (Pet. App. B at B-6) assumed the correctness of respondents' allegation for the purposes of their decisions.

than political bodies. Respondents sought permanent declaratory and injunctive relief, together with an order requiring petitioner to pay respondents and all similarly affected Native village governments the amounts they would have received but for the administrative expansion of the program.[9]

Respondents moved for a preliminary injunction to preserve sufficient fiscal year 1986 revenue-sharing funds (the last year of funding under the 1980 statute before it was legislatively amended to conform to the opinion of the Attorney General) to make up for the dilution in funding resulting from petitioner's administrative expansion of the program. District Judge Holland granted the preliminary injunction. App. A-

[9] Although respondents' complaint prayed for a class-wide award of retroactive monetary benefits (approximately 50 villages were in the purported class), respondents' motion for class certification was denied after the State volunteered to treat all similarly situated villages in accordance with the judgment, if any, secured by respondents. *Order Granting Preliminary Injunction*, App. A-1 at 9; Defendant's Memorandum in Support of Motion to Dismiss, App. B-1 at 1; Defendant's Opposition to Motion for Preliminary Injunction, App. C-1 at 1; Defendant's Opposition to Motion for Class Certification, App. D-1 at 1-2; and Defendant's Opposition to Emergency Motion Under Circuit Rule 27-3 in the Ninth Circuit, App. E-1 at 5. In addition, Circle Village's claim is disputed on the grounds that it did not apply for the last year of the program (fiscal year 1986), and a State-court claim by Circle for a prior year was dismissed as moot by the Alaska Supreme Court. *Circle Village Council v. State of Alaska*, No. S-1572, unpublished opinion (Alaska 1987). The maximum Noatak could recover for the shortfalls during 1983-1986 is $13,140.15. App. B-1 at 1, and App.C-1 at 1. The State is voluntarily holding $611 as the amount which the state calculates Noatak would be due for fiscal year 1986 should Noatak prevail in this action. See App. E-1 at 5.

1, infra. Pursuant to that injunction, petitioner's predecessor withheld $29,939 from his remaining 1986 revenue-sharing disbursements, an amount apparently reflecting the value of the last half of that year's dilution to all qualified Native village governments.[10]

When District Judge Kleinfeld (to whom the case was reassigned) ultimately dismissed the action on alternative jurisdictional grounds,[11] both the district court and the Ninth Circuit denied an injunction pending appeal that would have preserved the $29,939 petitioner was holding pursuant to the 1986 preliminary injunction. Nonetheless, petitioner voluntarily agreed to continue holding $611 for the benefit of respondent Noatak (respondent Circle Village having not applied to the revenue-sharing program for fiscal year 1986), an amount petitioner determined would be the maximum amount due Noatak should it prevail on the merits.[12]

The posture of this case is dramatically different from when it began. Throughout the litigation in the courts below, Alaska's executive branch staunchly defended the policy the Attorney General and petitioner's predecessors adopted in 1981, namely, that the Native villages which participated in the 1971 congressional settlement of aboriginal Native land claims are not tribes and must be viewed instead as

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[10] App. E-1 at 5.

[11] Judge Kleinfeld's alternative grounds were that either the *whole* case (including respondents' prayer for purely prospective declaratory and injunctive relief) was barred by the Eleventh Amendment, or that respondents' federal claims were insubstantial.

[12] App. E-1 at 5.

"racial groups." But in its petition here, the State reverses position and charts a new course:

> The State of Alaska does not deny the existence of tribes in Alaska. In fact, the State of Alaska believes that a majority of the Native villages listed in § 11(b)(1) of the Alaska Native Claims Settlement Act [43 U.S.C. § 1610] may well meet the criteria in 25 C.F.R. Part 83 for achieving tribal status.

Pet. at 11-12. As this new course evolves, the State's Executive branch may well recognize the tribal status of all ANCSA villages without the necessity of 200 separate lawsuits.[13]

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[13] Evolution of the Alaska Attorney General's new position apparently began with its *amicus* brief filed with the Alaska Supreme Court in support of a petition for rehearing of that court's 3-2 decision in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). In that decision the Alaska high court opined, as the State had argued for years, that most, if not all, Alaska Native villages lacked tribal status and hence sovereign immunity from suit in state court. In its *amicus* brief in support of rehearing, however, the State for the first time suggested that some Native villages might indeed have tribal status, at least to the extent of enjoying immunity from suit. *See* Pet. at 12 n.8. The Alaska Supreme Court denied the petition. Yet only a few months later that court issued a new decision, seemingly at odds with *Stevens Village*, holding that property owned by seventy tribal governments in Alaska is immune from state tax foreclosure proceedings under the provisions of the Indian Reorganization Act. *In the Matter of Taxes Owed to the City of Nome, Alaska*, 780 P.2d 363 (Alaska 1989). Several new cases are now pending in the Alaska Supreme Court which provide it with the opportunity to clarify its position on the tribal status of Native villages. *Nenana Fuel Co. v. Venetie*, Nos. S-3709 and S-3721 (filed Dec. 21, 1989 and Jan. 21, 1990 Alaska S. Ct.). *Harrison v. State of Alaska*, 784 P.2d 681 (Alaska

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY

This case is not worthy of plenary review. As petitioner concedes (Pet. at 16 n.11), the issue of the substantiality of respondents' federal claims does not justify review. Those claims will be tested on remand to the district court should the State elect to seek dismissal for failure to state a claim upon which relief can be granted.

As for the focal point of the petition—the question of the proper application of the Eleventh Amendment—this question is of little practical consequence

App. 1989), No. S-3953 (filed June 21, 1990 Alaska S. Ct.).

An example of the way Alaska has moved towards a generic state recognition of tribal existence is the enactment of a new regulation for the issuance of amended birth certificates for adoptions that occur in accordance with tribal custom but which fail to comply with the judicial adoption procedures of state law. 7 Alaska Admin. Code 05.700(b). Up until April 5, 1990, the State maintained, pursuant to the opinion of its Attorney General, that its Bureau of Vital Statistics could not issue amended birth certificates pursuant to a tribal council adoption "at least as long as the council's jurisdiction is in as much legal doubt as it is today." Op. (Inf.) Atty. Gen. in File No. 663-86-0248, April 16, 1986. Under the new regulation, of April 5, 1990, the Bureau will issue an amended birth certificate upon receipt of signed statements from the biological parents and "the governing body of the child's tribe" that a tribal customary adoption has occurred.

In short, this certiorari petition catches Alaska's judicial and executive brances in the midst of a period of rapid transition. Once Alaska's position crystalizes over the next year or two an assessment can be made to the degree of conflict, if any, with federal court precedent. Such an assessment now for purposes of the instant petition is premature.

here since under well-settled law, and regardless of the outcome of the petition, this case will continue as one seeking prospective relief. *Ex Parte Young*, 209 U.S. 123 (1908). Indeed, even as to that part of the case which *may* result in the expenditure of state funds, the disputed amount which might be paid is insignificant; any additional funds which the State *may* choose to spend will result not from the exercise of the federal judicial power but rather from the voluntary action of the State. *See* notes 8 and 9, *supra*. Moreover, the ruling below conflicts with no decision of this Court, and the alleged intercircuit conflict on the issue is far too remote and uncertain to qualify for the exercise of the Court's discretionary jurisdiction.

Finally, while the tribal-status issue might warrant review in a proper future case, the present unsettled nature of the State's shifting position and that of its highest court make such review premature and inappropriate in this case.

I. THE ISSUE CONCERNING THE SUBSTANTIALITY OF RESPONDENTS' FEDERAL CLAIMS WAS CORRECTLY DECIDED AND DOES NOT MERIT REVIEW

In his opinion for the panel majority below, Judge Noonan found substantiality for the threshold purpose of federal subject-matter jurisdiction in respondents' federal equal-protection claim:

> To wipe out [respondents'] political status on the ground that that status had an ethnic origin is itself a violation of the constitutional command not to discriminate on the basis of race. Paradoxical as it is, the allegation that the move from a tribal basis to a non-tribal basis for the [revenue-sharing] bonus was ra-

> cially discriminatory is an intelligible claim. Any governmental action based on the racial character of those affected is presumptively invalid.

Pet. App. B at B-21. It is *not* "illogical" (Pet. at 17) to find an equal protection violation in state action which purports to accord equal treatment to all alleged similarly situated non-municipal communities (i.e., both Native communities with tribal governments and non-Native communities with no tribal presence), when (1) such communities are in fact *not* similar and (2) the insistence that they must be treated alike is based on the racial ancestry of the tribal members of the tribal communities. It is settled that "the Fourteenth Amendment also reaches 'a political structure that treats all individuals as equals,' *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (STEVENS, J., concurring in judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups [or, as here, Indian tribes] to achieve beneficial legislation." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982).

The respondents' also have pressed three related federal causes of action alleging unlawful State interference with (1) federal laws and policies designed to further tribal self-government, (2) the congressionally conferred right of the tribes qua tribes to contract with the states, and (3) the fundamental constitutional rights of expression, religion and association which form the basis of cultural and political self-determination. For essentially the same reasons applicable to respondent's equal protection claims, the panel majority found these causes of action to be

cognizable federal claims not so "plainly meritless" as to deprive the district court of subject-matter jurisdiction under the test of *Hagans v. Lavine*, 415 U.S. 528 (1974). Pet. App. B at B-21 - B-22.

The panel majority thus agreed with District Judge Holland's preliminary conclusion that "[i]t is very clear . . . that there is a serious question raised" in this litigation regarding the propriety of petitioner's actions. App. A-1 at 13.[14]

The State concedes that the substantiality question is presented somewhat gratuitously and does not satisfy the certiorari criteria of this Court's Rule 17.[15] Respondent agrees.

II. THERE IS NO INTRA-CIRCUIT CONFLICT ON THE TRIBAL-STATUS ISSUE, AND NO OTHER REASON WARRANTING INTERLOCUTORY REVIEW

Petitioner also seeks review in this Court on the basis of an alleged intra-circuit conflict within the Ninth Circuit regarding the tribal status of Alaska Native villages. Pet. Br. at 7. Not only is petitioner wrong but the point is irrelevant, for an intra-circuit conflict, even if present, is not a proper basis for review in this Court. *See* Supreme Court Rule 10.

In response to this ill-conceived argument one need look no further than to the prominent absence of even

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[14] Significantly, petitioner never raised this issue in his petition for rehearing *en banc* in the Ninth Circuit. Nor did Judge Kozinski vote for *en banc* reconsideration on this (the only ground on which he dissented) or any other ground.

[15] Although he presents the question for review, petitioner indicates that he does not desire to prevail on this ground but would rather have the Court decide the other two questions presented. Pet. at 16 n.11.

one circuit judge vote in favor of rehearing *en banc*, Fed. R. App. P. 35(a)(1), despite petitioner having advanced precisely the same argument below. Indeed, the decision below is fully in accord with, if not compelled by, the Ninth Circuit's two most recent decisions concerning Alaska village tribes, *Native Village of Tyonek v. Puckett*, 890 F.2d 1054 (9th Cir. 1989), *cert. pending*, No. 89-609 and *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989). *See also Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), cert. denied, 475 U.S. 1121 (1986). The decisions in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986), and *Alaska v. Venetie*, 856 F.2d 1384 (9th Cir. 1988), on which petitioner relies for the assertion of an internal circuit conflict—the former dealing with the wholly incomparable claims of Native Hawaiians, and the latter affirming a preliminary injunction restraining a village tribal tax court proceeding pending a determination of federal court jurisdiction and clarification of the record—not only do not conflict with the decision below,but were both cited in *support* of the decision. *Native Village of Noatak*, 896 F.2d 1157, 1160 (9th Cir. 1990).

More basically, the holding below that respondents are federally recognized Indian tribes is clearly correct. It is consistent with the fundamental nature of an aboriginal Indian tribe and with the tribal nature of aboriginal land claims. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). It is also consistent with the further recognition of village tribal land claimants in ANSCA and the additional recognition accorded under the Indian Reorganization Act. Moreover, Congress has consistently treated Alaska

Native villages during the past two decades as tribes and has *never* exercised its plenary power under the Indian Commerce Clause to take away the villages' inherent self-governing authority. Even the State now concedes that most Alaskan villages possess tribal status. Pet. Brief at 11-12. The State's disagreement is only with the process by which the Ninth Circuit reached the same conclusion. Under these circumstances it would be considerably more efficient for this Court to allow the State's shifting position to be fully considered on the merits by the Alaska Supreme Court. The Ninth Circuit correctly held that respondents are tribes with substantial federal claims. These diversions aside, we turn to the heart of the State's petition: the relevance of the Eleventh Amendment to suits by Indian tribes.

III. THERE IS NO MEANINGFUL INTERCIRCUIT CONFLICT ON THE ELEVENTH AMENDMENT ISSUE, THE NINTH CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT, AND THE ISSUE HAS LITTLE, IF ANY, PRACTICAL IMPORT IN THIS CASE

A. The Claimed Intercircuit Conflict

Petitioner contends that the holding that the Eleventh Amendment does not apply to damages suits by Indian tribes against states is in conflict with the Eighth Circuit's sixteen-year-old decision in *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974). While superficially true, it is not the sort of "conflict" which justifies the exercise of this Court's certiorari jurisdiction.

Most significantly, the Eighth Circuit's *Standing Rock* decision predates this Court's unanimous decision in *Moe v. Confederated Salish & Kootenai Tribes*,

425 U.S. 463 (1976). There this Court held that the Tax Injunction Act, 28 U.S.C. § 1341, does not bar suits by Indian tribes under 28 U.S.C. § 1362 for declaratory and injunctive relief against state taxing schemes..Since the Moe decision, every court which has addressed the issue, except for District Judge Kleinfeld, has held the Eleventh Amendment doctrine of state sovereign immunity inapplicable to federal-question suits by Indian tribes.[16]

In *Moe*, this Court held that tribes could sue the states to enjoin state tax collections, despite the Tax Injunction Act. The Court based its decision on Congress' 1966 exercise of its Indian Commerce Clause and Article III powers to authorize tribes to bring federal-question suits in the federal courts. 28 U.S.C. § 1362. Chief Justice (then Justice) Rehnquist wrote that section 1362 "contemplated that a tribe's access to federal court to litigate a [federal-question case]

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[16] *See, e.g., Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079-80 (2d Cir. 1982); *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972 (D. Minn. 1990); *Navajo Nation v. New Mexico*, 14 Indian L. Rep. 3047 (D.N.M. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 595 F. Supp. 1077 (W.D. Wis. 1984); *Marty Indian School v. South Dakota*, 592 F. Supp. 1236, 1237 (D.S.D. 1984); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1307 (N.D.N.Y. 1983); *Charrier v. Bell*, 547 F. Supp. 580, 585 (M.D. La. 1982); *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1134-50 (E.D. Wash. 1978) (three-judge court), *rev'd in part on other grounds*, 447 U.S. 134 (1980); *Native Village of Tyonek v. Puckett*, No. A82-369 Civil, op. tr. at 17 n.17 (D. Alaska 3 Dec. 1986) (*dictum*), *aff'd in part, rev'd in part on other grounds*, 890 F.2d 1054 (9th Cir. 1989), *cert. pending*, No. 89-609; *Aguilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska 1976) (*dictum*). *See also* the Annotation on point at 65 ALR Fed. 649 (1983).

would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U.S. at 473; *see also id.* at 474.[17] The court reasoned that since the United States could have brought the suit in question on behalf of the tribe without regard to the "broad jurisdictional barrier" of the Tax Injunction Act (*id.* at 470), so also could a tribe suing on its own behalf. *Id.* at 473-74.

With near uniformity (see note 16, *supra*), the lower federal courts have read *Moe's* construction of section 1362 as both authorizing tribes to sue states on federal-question grounds, and as displacing any Eleventh Amendment immunity the states might otherwise possess—because, as with the Tax Injunction Act, the Eleventh Amendment is no barrier to an action against a state by the United States suing as trustee for a tribe. *United States v. Minnesota*, 270 U.S. 181 (1926). The Eighth Circuit's *Standing Rock* decision, decided before and without the benefit of *Moe's* construction of section 1362, and whose analysis is inconsistent with *Moe*,[18] has generally been disregarded. Even a district court which is bound by Eighth Circuit precedent has recently concluded that *Standing Rock* has no continuing vitality.[19] The issue will thus un-

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[17] One of the "respects" in which the United States as trustee could, but a tribe suing under section 1362 could not, sue in federal court is on a non-federal cause of action. *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

[18] The *Standing Rock* decision held narrowly that the United States could not have brought the tax challenge there in question on behalf of the tribe. 505 F.2d at 1140.

[19] *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972 (D. Minn. 1990).

doubtedly be revisited by the Eighth Circuit and this Court will be provided with the benefit of its analysis should review of the issue be required.

In its initial decision in this case, the Ninth Circuit followed this solid line of precedent and held that even if the Eleventh Amendment applies to federal-question suits by Indian tribes, its immunity has been overridden by section 1362 as construed in *Moe. Native Village of Noatak v. Hoffman*, 872 F.2d 1384, 1389 (1989). But the announcement of this Court's decision in *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989), re-emphasizing that congressional intent to abrogate state sovereign immunity "must be both unequivocal and textual" (*id.* at 2401), caused the Ninth Circuit to alter its view on the effect of section 1362.[20] Pet. App. B at B-12. This change in view, however, ignores the point that section 1362 must be read by the lower courts as it has been authoritatively construed by this Court in *Moe. Maislin Industries v. Primary Steel*, 58 U.S.L.W. 4862, 4865, 66 (June 21, 1990). Thus this Court's construction authorizing tribal suits against states, *did*, in effect, "unequivocally and textually" appear in the statute and therefore must

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[20]In this respect the Ninth Circuit may have erred, although for obvious reasons the State has not challenged this ruling. *Dellmuth* was not decided in the context of an Indian jurisdictional statute like 28 U.S.C. § 1362, designed to foster Congress' protective trust responsibility to Indian tribes. As other courts have held (*see* n.16), a large measure of section 1362 would collapse if, contrary to Congress' clearly stated intent, Indian tribes were denied access to federal court to fully vindicate federal claims against states (rather than being forced to litigate a portion of their claims in traditionally hostile state courts).

be followed.[21] As this Court explained in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983):

> Congress contemplated that section 1362 would be used particularly in situations in which the United States suffered under a conflict of interest or was otherwise unwilling or unable to bring suit as trustee for the Indians.

Id. at 559 n.10.

Given Congress' purpose it would be anomolous, indeed, if tribes (throughout the U.S.) could obtain relief directly from states in the absence of such a conflict, but could not do so when the United States was conflicted out or otherwise unwilling to bring suit.

The Ninth Circuit nonetheless held to its judgment that a federal-question action such as this is not barred

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[21] Furthermore, this Court's stringent construction test comes into play only with respect to congressional action "placing a considerable strain on '[t]he principles of federalism that inform Eleventh Amendment doctrine.' " *Id., quoting Pennsylvania State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). The test is designed "[t]o temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure . . . ." *Id.* As Judge Noonan has cogently demonstrated (Pet. App. B at B-10 - B-19), however, and as discussed in the next argument, a suit against a state by a federally recognized Indian tribe—a suit between two sovereigns within "our constitutional structure"—simply does not "upset[] 'the fundamental constitutional balance between the Federal government and the States.' " *Dellmuth*, 109 S. Ct. at 2400, *quoting Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 (1985).

by the Eleventh Amendment (see next argument).[22] That judgment accords (albeit by a different and more fundamental analysis) with the substantial body of judicial judgments allowing tribes to sue the states unhampered by the Eleventh Amendment. The uniformity of these judgments across the Nation is broken by nothing more than the long-ignored technical conflict with the Eighth Circuit's pre-*Moe* decision in *Standing Rock*. Moreover, the Ninth Circuit's fresh analysis below on an issue of first impression is contradicted by no decision of *any* court, including this one. Thus, the issue does not deserve attention by this Court unless a true conflict develops among the circuits, or unless the lower courts' handling of the issue portends some important result. Neither circumstance presently exists. Since federal court suits by a tribe against a state will invariably be grounded on section 1362, the Ninth Circuit's Eleventh Amendment analysis becomes virtually academic given the consistent interpretation of that jurisdictional statute. Such an issue is not worthy of certiorari.

B. The Alleged Inconsistency With This Court's Decisions

The applicability of the Eleventh Amendment to suits by Indian tribes is an open question in this Court. In *Arizona v. California*, 460 U.S. 605, 614 (1983), the Court, citing its earlier *dictum* in *United States v. Minnesota*, 270 U.S. 181, 193-95 (1926), merely "[a]ssum[ed], *arguendo*," that the Amendment applied to such a suit, and allowed the tribes to intervene in

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[22] Petitioner suggests that the Ninth Circuit has authorized tribes to sue states in federal court in "*any* case," rather than just federal-question cases. Pet. at 11 (emphasis in original); *id.* at 16 n.11. There is no basis for such a reading of the opinion below.

the case because the United States, to which the Amendment does not apply, was also seeking relief on behalf of the tribes. The issue clearly being an open one here, the decision below, by definition, cannot be inconsistent with the decisions of this Court. It also is not inconsistent with the principles of either State or Indian sovereignty established by the Court's decisions.

The State asserts an absolute "right to be free from suit in federal court in the absence of consent or without an explicit abrogation of that right by Congress." Pet. at 5. While the immunity conferred by the Eleventh Amendment is indeed a sweeping one, it plainly is not absolute: "the Eleventh Amendment has not accorded the States absolute sovereign immunity in federal court actions. The States are subject to suit by both their sister States and the United States." *Nevada v. Hall*, 440 U.S. 410, 420 n.19 (1978).[23]

Petitioner thus overlooks that the bedrock principle of Eleventh Amendment immunity, as construed by the Court, is, in Hamilton's pivotal words, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent." *The Federalist* No. 81 (emphasis added); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890); *accord, e.g., Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S.Ct.

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[23] "Further, prospective injunctive and declaratory relief is available against States in suits in federal court in which state officials are the nominal defendants." *Nevada v. Hall*, 440 U.S. at 420 n.19; see part III C, *infra*. And, as the *Nevada* Court held, there is nothing in the Constitution prohibiting the courts of a state from entertaining a tort action for damages against a sister state.

at 2297-98 (Scalia, J., concurring in part and dissenting in part). This central concern of the Amendment with suits by *individuals* forms the basis for the Court's holdings that the Amendment does not limit suits by the United States against a state, *United States v. Texas*, 143 U.S. 621 (1892), nor suits by one state against another, *South Dakota v. North Carolina*, 192 U.S. 286 (1904). As to these two classes of cases, it has been repeatedly held that any immunity from suit that a state might have had was surrendered "in the plan of the convention." *Monaco v. Mississippi*, 292 U.S. 313, 324 (1934), quoting Hamilton in *The Federalist* No. 81.[24]

As the opinion below persuasively demonstrates, a suit by a sovereign Indian tribe against a state does not fall within this core concern of the Amendment and related considerations of federalism, any more than does a suit by a state or the United States against a state. As "domestic dependent nations" legally distinct from both the states and the United States, but not "foreign," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831),[25] and which constitute "this

[24] The single exception to the Court's confinement of Eleventh Amendment principles to suits by individuals is its holding that a suit against a state by a *foreign* state, which "lies outside the structure of the Union," *Monaco*, 292 U.S. at 330, is barred. Indian tribes, of course, do not lie "outside the structure of the Union," and none of *Monaco*'s reasons for barring suits by foreign states is applicable to the Indian tribes. *See e.g.*, 292 U.S. at 330.

[25] *See also, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (tribes viewed "as distinct, independent political communities, retaining their original natural rights"; "a people distinct from others"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("[a]s separate sovereigns pre-existing the Constitution"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), *quoting United States v. Kagama*, 118 U.S. 375, 381-82 (1886) ("not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided"); *see generally United States v. Wheeler*, 435 U.S. 313 (1978).

third source of sovereignty in the United States,"[26] the Indian tribes stand on a constitutional footing comparable to that of the United States when it comes to federal-question suits against the states. "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Monaco*, 292 U.S. at 329.[27]

[26] C. Wilkinson, *American Indians, Time, and the Law* 103-104 (1987).

[27] It is often recognized that in some respects tribes "have a status higher than states," *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959), or that they "occupy a sovereign status somewhat comparable to that of the States." *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1306 (N.D.N.Y. 1981), *aff'd in part, vacated on other grounds*, 691 F.2d 1070 (2d Cir. 1982); and *see Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (concurring and dissenting opinion by Justice Stevens pointing out that Indian tribes have been afforded more deference than states). Indeed, in a number of important respects Indian tribes enjoy immunities from state action that are greater than the immunities of the United States and its officers from comparable forms of state action. *See* C. Wilkinson, at 98 & nn. 65-69 (1987). Tribes "exercise local sovereignty in much the same way that states do outside of Indian country," *id.* at 116, as well illustrated by this Court's recent decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *LaPlante*.

The "plan of the convention" strongly suggests this result. For upon ratification of the Constitution the states lost *all* authority over Indian affairs, "the regulation of which, according to the settled principles of our Constitution, are committed *exclusively* to the government of the Union." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832) (emphasis added). *See also, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law").[28]

Petitioner argues that the decision below "defies historical logic," because the Framers "had not the

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[28] In *Pennsylvania v. Union Gas*, ___ U.S. ___, 109 S. Ct. 2273 2281-85 (1989); *id.* at 2295 (White, J., concurring in relevant part), the Court held that the Interstate Commerce Clause empowers Congress to abrogate the immunity of the states from suit in federal court, because the states surrendered that power when they adopted the Constitution. There can be no doubt, then, that under the Indian Commerce Clause Congress has the power to override any sovereign immunity the States may possess. But the latter clause has an even broader effect than the former (*see, e.g., Cotton Petroleum Corp. v. New Mexico*, ___ U.S. , 109 S. Ct. 1698 (1989)), though they are contained in the same constitutional provision, because the Indian Commerce Clause of its own force effects a complete divestiture of state sovereignty—so that upon the adoption of the Constitution there was no state sovereignty for Article III and the Eleventh Amendment to preserve.

The State thus mischaracterizes the decision below when it claims that the Ninth Circuit's "logic" means "that the States waived immunity from suit [merely] by agreeing to a Constitution which mentions federal power over Indian matters." Pet. at 6, 9. It is not the mere "mention" of the power, but the complete surrender of authority over the subject within the "constitutional structure," that effects the "waiver."

Indian tribes in view when they opened the courts of the Union to [specified] controversies. . . ." Pet. at 10, *quoting Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 18. But it would be anomalous if the Framers, who vested Congress with plenary and exclusive power over Indian affairs while stripping the states of all such authority, had simultaneously determined to constitutionally preclude Indian tribes from resorting to the courts of the Nation to seek a remedy for any such unconstitutional state interference, leaving them only to "appeal . . . to the tomahawk, or to the [federal] government." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. Perhaps "the idea of [an Indian tribe] appealing to an American court of justice for an assertion of right or a redress of wrong" did not occur to the Framers, as it "had perhaps never entered the mind of an Indian or his tribe." *Id.* If that be so, it is all the more reason to conclude that the Framers did not intend the Eleventh Amendment to apply to tribes, as distinguished from "citizens" and "foreign states" (which were at least mentioned by name), in the event that Congress should exercise its Article III and Indian Commerce Clause powers—as it did with the 1966 passage of 28 U.S.C. § 1362—and authorize tribes, who now "are entitled to take their place as independent qualified members of the modern body politic,"[29] to bring federal-question suits in the federal courts.

The Ninth Circuit has correctly perceived the principles of federalism and the constitutional structure applicable here. Its analysis is not in conflict with any

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[29] *Arizona v. California*, 460 U.S. 605, 615 (1983), *quoting Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968), *quoting Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

decision of this or any other Court. While the issue may eventually call for final resolution by the Court, such review most properly should await a case, should there be one, in which the question has reasonably clear consequences necessitating an answer—after the issue has received full deliberation among the lower federal courts.

C. The Issue Has Little, If Any, Practical Import In This Case

Regardless of the applicability of the Eleventh Amendment *vel non*, the district court plainly erred in dismissing the *whole* case on state-sovereignty grounds. It continues to be settled law, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that the Amendment does not bar a suit against a state official in his official capacity for prospective declaratory and injunctive relief, " 'because official-capacity actions for prospective relief are not treated as actions against the State.' " *Will v. Michigan Dept. of State Police*, ___ U.S. ___ ,109 S. Ct. 2304, 2311 n.10 (1989) (*quoting Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)); *see also, e.g., Papasan v. Allain*, 478 U.S. 265, 282 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). Respondents seek such prospective relief in order to be freed of the State's policy of treating Native villages as "racially exclusive groups" and to enable them to appeal to the Alaska Legislature as federally recognized tribes. They are entitled to an adjudication on the merits regardless of any damages which it may claim.

Moreover, the damages claim is highly uncertain in the present posture of the case. Aside from the fact that the viability of respondents' federal claims has not been decided, the extent of damages, if any, also remains controverted and undecided.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 16, 1990

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A85-503 Civil

NATIVE VILLAGE OF AKIACHAK, NATIVE VILLAGE OF NOATAK, and CIRCLE VILLAGE, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

EMIL NOTTI, as Commissioner, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Defendants.

FILED

MAR 03 1986

PRELIMINARY INJUNCTION

Plaintiffs have moved for a preliminary injunction preventing Defendant from distributing certain funds remaining in his possession from a 1986 fiscal year appropriation to the Department of Community and Regional Affairs by the Alaska State Legislature in furtherance of revenue sharing for the benefit of unincorporated communities. The motion is opposed. The Court has heard oral argument. For the reasons hereinafter set forth, the motion is granted.

Background to Litigation

In 1980, the Alaska Legislature enacted AS 29.89.050 which made provision for state aid to "Native village governments". The statute provided in pertinent part:

Sec. 29.89.060. State aid to Native village governments. The State shall pay $25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, "Native village government" means

(1) a local governing body organized by authority of the Act of Congress of 25 U.S.C. 476 (the Act of Congress of June 18, 1934)

(2) a traditional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village which meets the requirements of 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act). (§ 3 ch 155 SLA 1980)

The Court takes note of the fact that the State of Alaska still embodies vast areas having, for all practical purposes, no local government other than that available through AS 29.03.010-.020 which makes certain limited provisions for what is quite appropriately denominated as "the unorganized borough". In fact, there are many isolated communities within the unorganized borough. Some of them are incorporated as municipalities under various of the provisions of title 29 of Alaska Statutes. Others are unincorporated. Of the latter, many are the locus of active Native organizations. They are created or recognized primarily under federal law pursuant to or for purposes of implementing various of the federal statutes pertaining to Alaska Natives. *See, for example*, 25 U.S.C. § 476, 43 U.S.C. §§ 1601-1628. Many of the Native communities are, at least for purposes of federal law, recognized as "Indian tribes". 25 U.S.C. § 450b(b).

The Court has no doubt that the above-quoted statute was an attempt by the Alaska Legislature at funding, from its short-lived excess wealth, some limited public services in the unorganized borough for the people of unincorporated Native communities. The statute would appear to have been a well-intended, but in retrospect very troublesome, piece of legislation, for it appears that a question was raised almost immediately about the selection of "Native village governments" as above defined by AS 29.89.050 as the recipients of state aid.[1] Someone undoubtedly raised with Defendant Commissioner the question: "What about the non-Native, unincorporated village communities?" Defendant Commissioner in turn appears to have sought guidance from the Attorney General of the State of Alaska who, in April and September of 1981, wrote opinions as to the constitutionality of various aspects of AS 29.89.050.

The first attorney general's opinion raised serious questions as to the constitutionality under the Constitution of the State of Alaska of any law which tended to constitute unincorporated entities as "local government units". *See* Attorney General Opinion to Dept. of Community & Regional Affairs, dated April 27, 1981. The opinion counselled amending the statute in question to "open the class of beneficiaries to other entities and other communities and including them, on application, in the distribution out of a concern that section 50 embodied an equal protection violation. *Id.* at 4. This first attorney general's opinion also alluded briefly to the prospect of public funds being expended for private purposes if used by tribal organizations for non-governmental, corporate purposes. *Id.* at 4.

It would appear that in response to the latter problem the commissioner adopted regulations as regards applicants for state aid monies as authorized by AS 29.89.090. The regulations, effective August 20, 1981, provided in pertinent part:

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[1] Unfortunately, the question which was raised was not promptly addressed by the Alaska Legislature and did not find its way to court until the program, as originally enacted, was within a few months of its [illegible] and all but the last one-half of one year's appropriation distributed.

(e) An applicant which is a Native village government must meet the following standards to qualify for a payment under AS 29.89.050:

(1) the applicant agrees to irrevocably dedicate the payment the applicant receives under AS 29.89.050 for a public purpose other than general administration of the Native village government; and

(2) the applicant provides its residents with at least one of the public facilities and services listed in AS 29.48.030(1)-(6), (8)-(21) and (23) as of July 1 of the entitlement year[2]

The second opinion of the attorney general stated that AS 29.89.050 was unconstitutional "if read literally to restrict aid to Native villages." Attorney General Opinion to Dept. of Community & Regional Affairs, dated September 2, 1981. The opinion went on to counsel that the commissioner should simply read out of AS 29.89.050 the words "Native" and "government" as well as the definition of "Native village government". *Id.* at 1. The opinion concludes, after discussion of certain equal protection implications of the restrictive language, that:

> We believe that the interpretation of AS 29.89.050 to authorize grants of state money to all villages is the only interpretation consistent with our constitution.

Id. at 3.

The latter attorney general's opinion represents, as do the parties now before the Court, that in 1981 and in

[2] AS 29.48.030(a), to which the above regulation presumably refers, sets out various powers which a municipality may exercise. Those enumerated in the quoted regulation are streets and sidewalks, sewers, harbors etc., watercourse and flood control, health services etc., cemeteries, cold storage plants, preservation etc. of historic sites, and emergency medical services.

subsequent years the Alaska Legislature funded AS 29.89.050 with at least some level of knowledge that the Defendant Commissioner was then implementing the statute as interpreted by the attorney general—that is, so as to benefit all unincorporated communities, not just those having a "Native village government". Least the latter be misunderstood, it is the Court's conclusion that there was, up until the 1985 Alaska State Legislature, no express legislative recognition of the Defendant Commissioner's interpretation of section 50. Rather, what appears to have happened is that the Defendant Commissioner's budget was proposed to the legislature in sufficient amount to fund all anticipated applicants, both Native village governments and other unincorporated communities. What complicates this budgetary matter is the fact that all parties also appear agreed that the legislature never completely funded this state aid program. Thus, although section 50 would appear to provide for $25,000 per applicant, the Court understands that the legislature never appropriated enough money that all expected applicants could have obtained the full $25,000. Applicants apparently received a pro rata share of the appropriation.

The state aid program under section 50 appears to have been administered as above discussed through fiscal year 1985—that is, the state's fiscal year ending June 30, 1985.

The 1985 session of the Alaska State Legislature, in conjunction with recodifying the municipal code (Title 29), repealed section 29.89.050 and enacted a substitute state aid program under AS 29.60.140. this new program, entitled "State aid to unincorporated communities", provided in pertinent part:

> (a) The department shall pay to each unincorporated community an entitlement of $25,000 each fiscal year to be used for a public purpose. The department with advice from the Department of Law shall determine whether there is in

each unincorporated community an incorporated nonprofit entity or a Native village council that will agree to receive and spend the entitlement. If there is more than one qualified entity in an unincorporated community, the department shall pay the money under the entitlement to the entity that the department finds most qualified to receive and spend the money. The department may not pay money under an entitlement to a Native village council unless the council waives immunity from suit for claims arising out of activities of the council related to the entitlement. . . . .

(b) In this section "unincorporated community" means a place in the unorganized borough that is not incorporated as a city and in which 25 or more persons reside as a social unit. (§ 16 ch 74 SLA 1985)

The reenacted state aid program is structured in a fashion which addresses most if not all of the concerns expressed by the attorney general in his two above-mentioned opinions. The amended state aid program, by the express terms of the recodified municipal code, became effective January 1, 1986. Because of the existence of varying effective dates, it is abundantly clear that the legislature selected the latter after some deliberation.

Why the latter date would have been selected, when in fact the state aid program as well as state budgets are operated on a July 1 to June 30 fiscal year, is not at all clear to the Court. Applications for state aid under the subject program are received in the fall, are partially funded (the Court understands 50% of the annual entitlement) before the end of a calendar year, and the balance, at least as to fiscal year 1986, is due to be paid out on or about March 1, 1986. Because AS 29.60.140 did not become law until January 1, 1986, it appears that the

Defendant Commissioner has received applications for state aid under the subject program as originally constituted (AS 29.89.050) and has partially funded these applications with monies provided by the 1985 legislature from the department's fiscal 1986 budget. As of January 1, 1986, the state aid to unincorporated communities statute became operative (AS 29.60.140), and it is now contended by the state that the balance of the department's fiscal year 1986 appropriation for this program should be made under the new statute.[3] Plaintiffs, however, contend that they should receive the full $25,000 state aid payment under section 50 as originally written—that is, restricted to "Native village government" applicants in preference to other unincorporated communities.

To digress for a moment, Defendant has alluded to the standing of Plaintiffs Native Village of Akiachak and Circle Village in this case. It has been suggested by the Defendant that the Native Village of Akiachak is in fact an incorporated municipality and therefore not eligible under either the old or the new state aid program and that Circle Village has not applied for state aid in fiscal year 1986. An incorporated village would appear to have no standing whatsoever to sue for state aid to unincorporated communities or village governments. Without an application having been filed, the Court does not perceive that Circle Village would have any standing either, since it would appear that they could not in any fashion be harmed—without an application, they would not be entitled to an allocation under the statute. The Court does not have a motion to dismiss before it but, for purposes of the motion for preliminary injunction, it would appear that the Court has before it only one viable plaintiff. The latter would

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[3] The state contends that AS 29.60.140 renders this suit moot. Not so. The mootness argument simply begs the question of which statute applies to the 1986 appropriation and applications approved by Defendant for allocation from that fund.

appear not to present a serious problem in light of the fact that, in opposing class certification as sought by Plaintiffs in a separate motion not yet ripe for decision, Defendant Commissioner has indicated that "[A] final judgment in favor of any one party will change the way the law is administered for all similarly situated parties." Opposition to Motion for Class Certification, at 2, filed Feb. 18, 1986.

Tests for Granting Preliminary Injunction

An applicant for a preliminary injunction must meet one of two prevailing tests before being entitled to such relief. Under the "traditional" tests, Plaintiffs must show:

(1) a strong likelihood of success on the merits;

(2) that the balance of irreparable harm favors the movant; and

(3) that the public interest favors granting an injunction.

Aleknagik Natives, Ltd. v. Andrus, 648 F.2d 496, 501 (9th Cir. 1980).

Under the "alternative" test, a preliminary injunction is appropriate where the applicant demonstrates either:

(1) a combination of probable success on the merits and the possibility of irreparable injury, or

(2) that serious questions are raised and the balance of hardships tips sharply in movant's favor.

Id. at 502; *William Ingles & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975). Under this "alternative" test, this Court must consider the public interest as a third factor. *American Motorcyclist Association v. Watt*, 714 F.2d 962, 967 (9th Cir. 1983).

In the last analysis, the foregoing two sets of standards are the extremes of a factual and legal continuum, *William Ingles & Sons Baking Co.*, 526 F.2d at 88, which circumscribes and defines the manner in which this Court is to exercise its discretion in granting or denying preliminary injunctions. *American Motorcyclist Association*, 714 F.2d at 965.

The key element in applying the foregoing tests is the relative hardship to the parties, as it is this factor which is employed to locate any given case in the continuum between the last two statements of the test. *Benda v. Grand Lode of International Association of Machinists, etc.*, 584 F.2d 308, 314-15 (9th Cir. 1978); *cert. dismissed* 441 U.S. 937 (1979); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

Discussion

Balance of Hardship/Irreparable Harm

Since the balance of hardship and the impact of irreparable harm are the critical factors in granting preliminary injunctions, we address that subject first.

The Defendant Commissioner is about to disburse the balance of his fiscal year 1986 appropriation for state aid to unincorporated communities, however constituted. That distribution will apparently take place between March 1 and March 15, 1986, and will result in exhaustion of this fund. Once paid out, the monies in question will be spent by the recipient organizations and cannot be retrieved. There would appear to be no probability of the Alaska Legislature effecting a supplemental appropriation for fiscal year 1986, nor does the Court conceive that it would have the power to require such. Thus, to the extent that the Defendant Commissioner's allocation of the funds available to him to all applicant unincorporated communities will result in a diminution of that distribution which could be made were the distribution made only to Native village governments, as defined in AS 29.89.050,

Native village governments will be deprived of money that, for all practical purposes, can never be replaced. The loss, although strictly monetary, will in a real sense be irreparable.

On the other hand, it is contended by the State that programs beneficial to the general public of non-Native unincorporated communities will be disrupted if the Defendant Commissioner is restrained from distributing the state aid appropriation as he has done in the past. While the latter appears to be a legitimate and appropriate matter for the Court to consider under the "public interest" heading of the test for granting preliminary injunctions, the Court does not perceive that the Defendant Commissioner or the State of Alaska is in any real fashion thereby exposed to irreparable harm. A supplemental appropriation is possible—if unlikely—even though it cannot be required.

Irrespective of whether the State's argument be characterized as a "public interest" concern or a "hardship" factor, since this Court does not envision that it would order the Defendant Commissioner to make a disbursement of disputed funds to "Native village governments" on a preliminary basis, the hardship for non-Native unincorporated communities is really a problem of delay or timing, not one of a probable irrevocable loss. Put somewhat more simply, the Court perceives that delaying disbursement of a portion of the fiscal year 1986 state aid appropriation to unincorporated communities does not amount to irreparable harm, even though the Court recognizes that it may present some short-term hardship in the delivery of some intended service. As a consequence, the Court perceives that there is a real risk of irreparable harm to Plaintiffs which is balanced against some hardship—but not irreparable harm—to villages such as Noatak.

Probability of Success

The Court is not prepared to say that it finds a strong likelihood of success on the part of Plaintiffs as to the

merits of their claim. However, the Court is convinced that there is most definitely a serious question presented by the Plaintiffs' complaint. The Court was amazed, at first reading, that the attorney general would take the position that the Defendant Commissioner could so completely emasculate the plain language of AS 29.89.050 and still proceed with the state aid program.

Although the attorney general purports to interpret AS 29.89.050 in such a fashion as to render it in his view constitutional, the deletions which he counselled are in reality no interpretation at all. Rather, the deletions are an outright excision of unequivocal language—a rewriting of section 50.

Clearly where there is room for more than one interpretation, the attorney general and courts must always select that interpretation which leads to a constitutional result. Here there is absolutely no room for doubt but that the Alaska Legislature intended to provide state aid to "Native village governments" as defined in section 50. There is no ambiguity, there is no conflict, there is no uncertainty about what the legislature intended. The Court doubts seriously that such a substantive redirection of the originally stated scope of section 50 can be achieved administratively for the purpose of salvaging what is contended to be an unconstitutional statute. This aspect of the matter alone is a sufficiently serious question to cause the Court to require maintenance of the statute quo so as to protect Plaintiffs.

The parties have, of course, presented some more substantive and basic arguments attacking and supporting the position of the attorney general that the state aid to Native village governments statute is unconstitutional. The Court has reached no conclusion at this time as to whether Plaintiff Noatak or a similarly situated entity is likely to prevail on the underlying question of the constitutionality of AS 29.89.050 as enacted. It is very clear, however, that

there is a serious question raised. As set out in the discussion portion of this order, Native village councils and similar organizations, while not local government units under the Constitution of the State of Alaska, are beyond any question federally recognized as (for lack of a better term) quasi-governmental entities. At this preliminary stage, the Court is persuaded that there is a least a possibility, if not a probability, that the special status of "Native village governments" under federal law is sufficient to withstand an equal protection challenge. In this regard, the State has consistently characterized the "Native village government" rubric of section 50 as being a racially tainted term. The Court has substantial doubts that this characterization is appropriate.

In summary, then, the Court concludes that at least Plaintiff Noatak is confronted with possible irreparable harm and that the balance of hardship tips definitely in its favor. While the Court is not prepared to say that a plaintiff will probably succeed in this case, there is most certainly a serious question raised as regards Defendant Commissioner's implementation of AS 29.89.050. There is also a serious question as regards which of section 50 or AS 29.60.140 should be applied in the distribution of funds remaining in Defendant Commissioner's fiscal year 1986 appropriation for state aid to unincorporated communities.

State Aid Program Regulations

Plaintiffs also seek to have this Court enjoin Defendant Commissioner from enforcing his regulation that state aid monies be devoted to a public purpose rather than general administration of the recipient. On the basis of the preliminary and somewhat abbreviated presentation of this point, the Court is not satisfied that there is any basis for enjoining this regulation.

The Court does not perceive that 19 AAC 39.051(e)(1) is in any respect interwined with the difficulties presented

by the attorney general's opinion of the constitutionality of AS 29.89.050 as originally written. Defendant Commissioner has clear authority to adopt regulations "necessary to carry out the purposes of AS 29.89.010 - 29.89.100." AS 29.89.090.

There would appear to be no room for doubt but that the Constitution of the State of Alaska requires that appropriations of public money be for a "public purpose". Article IX, Section 6, Constitution of the State of Alaska. Assuming, as is obviously the case, that monies have come and will continue to come to Plaintiff Noatak and other similar village groups under both the original state aid program and/or the amended program, there would appear to this Court to be no basis whatsoever for an argument that those monies need not be devoted to a public purpose. It is clear that they must be so devoted. Preliminarily, Defendant Commissioner's regulation on this subject would appear to be a reasonable approach to the necessity that monies being disbursed through appropriations to the Commissioner for state aid be expended for a public purpose. Entities such as Plaintiff Noatak being something other than municipal corporations or other local government units recognized by the Constitution of the State of Alaska, it does not at first blush appear unreasonable to this Court that Defendant Commissioner would preclude state aid recipients who are not local government units from using state aid for general administration purposes. There would appear to be a real risk of misuse of the state aid funds if they could be applied to the general administrative expenses of entities which are not local government units.

Bond

The parties have not addressed the question of an appropriate bond. Rule 65(c), Federal Rules of Civil Procedure, expressly provides that no preliminary injunction shall issue without the applicant providing security for the payment of costs and damages if it is later found that the

injunction was improvidently granted. The Court does not perceive, and the parties have not suggested, that there is any substantial risk of damages to a party in this case. The exposure, therefore, would appear to be limited to costs to which the State might be entitled should Plaintiffs not prevail.

The Court deems a bond in the amount of $250 to be adequate protection for costs at this initial stage of the proceedings. Upon application of Defendant, the Court will review this aspect of the matter at a later date should it subsequently appear that such bond is substantially inadequate to cover costs which might be awarded Defendant.

Class Certification

The Court has hereinabove alluded to both the posture of Plaintiffs Akiachak and Circle and the Plaintiffs' motion for class certification. As already intimated, the Court perceives that there are serious problems with the role of Akiachak and Circle in this case. The Court solicits these Plaintiffs to consult with Defendant as regards their withdrawal from this case. Similarly, the Court calls upon Plaintiff Noatak to confer with the Defendant as regards the need for class certification in this case. In light of Defendant's response to the motion for class certification, such would appear to be unnecessary. The Court already has some doubts as to the practical economics of this case, since this action was not brought until substantially all of the money involved between 1980 and 1986 had been disbursed and the statute in question amended as to fiscal year 1987 and thereafter. In short, the expense of class certification would appear to this Court to be of dubious economic justification in light of the sum probably in controversy and, at least superficially, class certification would appear to be unnecessary in light of the Defendant's representation.

Defendant Enjoined

In consideration of the foregoing, Defendant Emil Notti, Commissioner of the Department of Community and Regional Affairs, his deputies, all other employees of the Department of Community and Regional Affairs, and any others acting in concert with them, are herewith enjoined and restrained from disbursing from his fiscal 1986 appropriation for state aid to unincorporated communities or Native village governments, whether under AS 29.89.050 or AS 29.60.140, money which is necessary to completely fund the application of Plaintiff Native Village of Noatak and all other Native village government applicants for fiscal year 1986 state aid.

As this matter now stands, the Court appears to have before it only one plaintiff applicant who is entitled to the benefit of the foregoing injunction. However, class certification has been sought and the Court has taken note of Defendant Commissioner's representation through counsel that he intends to treat all applicants alike such that if he must make provision for full funding of one applicant, he will do likewise for all other applicants who would properly be characterized as Native village governments under AS 29.89.050 as enacted by the legislature and without the modifications urged by the attorney general. Thus it is the intent of this order that Defendant Commissioner reserve sufficient funds from his fiscal year 1986 appropriation for state aid, whether under AS 29.89.050 or AS 29.60.140, to pay the maximum $25,000 entitlement to each "Native village government" applicant and to hold said funds pending final resolution of this case. Subject to the foregoing, Defendant may make such further distribution to all applicants on a pro rata basis as he shall determine.

This restraining order shall become operative upon the posting of the required bond.

DATED at Anchorage, Alaska, this 3rd day of March, 1986.

/s/ H. Russel Holland
United States District Judge

cc: Lawrence Aschenbrenner
Hal Brown

APPENDIX B

ATTORNEY GENERAL, STATE OF ALASKA MEMO IN SUPPORT OF MOTION TO DISMISS

After the revenue-sharing program was restructured in 1981 so that all unincorporated communities could participate, funds continued to be distributed to each community as appropriated by the legislature.[4] The legislature has never funded the program fully, so communities did not receive the $25,000 authorized annually by AS 29.89.050, but somewhat lesser amounts both before and after the program was expanded. The Noatak Village Council received its share each year of the program. In Circle, the Village Council failed to apply for the funds for FY 83

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[4] The decision to expand the program was made in 1981. The next legislative session, in 1982, appropriated funds under the expanded program for the fiscal year beginning July 1, 1982 (Fiscal Year 1983). Thus FY 1981 and FY 1982 funds were administered under the original restrictive program; FY 1983, FY 1984, and FY 1985 were administered under the expanded program; and FY 1986 and subsequent years are under the new statute, AS 29.60.140, which codifies the expanded program of FY 83-85.

The amount received per community for each year of the program is as follows:

restrictive program:	FY 1981	$21,079
	FY 1982	$23,194
expanded program:	FY 1983	$19,933
	FY 1984	$21,037
	FY 1985	$23,104
per AS 29.60.140:	FY 1986	$22,785

Pro-rata sharing of shortfalls for this program is required by AS 29.60.170 (former AS 29.89.080). Contrary to plaintiffs' mistaken assumption, these shortfalls were not due to expansion of the program (the legislature knew the full number of eligible villages under the expanded program when it appropriated funds for them), but because the legislature chose, for its own fiscal reasons, never to fund the program at full levels. For more detail *see* Part II *infra*, and affidavit of Rutherford, Exhibit A.

and FY 84, so the funds for Circle were administered through

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APPENDIX C

EXHIBIT C
A85-503

Come now plaintiffs and in response to defendants first set of interrogatories answer as follows:

Interrogatory No. 1: Paragraph 18 of the Complaint states that plaintiffs and their class are owed $853,587.51. State in detail how this figure was arrived at.

Answer: Pursuant to AS 29.89-050 each "Native Village Government" in an unincorporated community was entitled to revenue sharing funds of $25,000. Each fiscal year since this statute was passed sufficient funds were appropriated to provide each Native Village Government that applied with its full entitlement of 25,000. For the reasons set forth in paragraphs 15 and 16 of the Complaint Plaintiffs and their class Members did not receive their due. As set forth in the table below, Plaintiffs and their class received less each year than they were entitled. The total figure owed was reached by multiplying the number of Native Village Governments funded times the difference between 25,000 and the amount disbursed for each year. The totals for each year were added to reach the figure of $853,587.51.

Number of Native Villages Funded under AS29.89.050		Funds Appropriated Under AS29.89.050
1981	54	1,495,322.00
1982	41	1,275,683.00
1983	50	1,335,568.00
1984	54	1,556,738.00
1985	53	1,617,280.00

	Funds Disbursed to Native Village Governments Pursuant to AS29.89.050	Difference Between Statutory Entitlement and Amount Disbursed
1981	21,079.64	3,921.36
1982	23,194.23	1,805.77
1983	19,933.85	5,066.15
1984	21,037.00	3,963.00
1985	23,104.00	1,896.00

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. A85-503

NATIVE VILLAGE OF AKIACHAK, NATIVE VILLAGE OF NOATAK, AND CIRCLE VILLAGE ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

vs.

EMIL NOTTI, AS COMMISSIONER OF DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,
Defendants.

OPPOSITION TO MOTION
FOR CLASS CERTIFICATION

Defendant opposes plaintiffs' motion for class certification. Class treatment of this case will in no way make its administration easier or aid any affected entities, but will complicate the case for no good reason.

1. As plaintiffs admit, resolution of the one large legal question in this case—whether former AS 29.89.050 should have been administered in the manner plaintiffs seek—will affect all members of any putative class whether or not this is a class action. A final judgment in favor of any one party will change the way the law is administered for all similarly situated parties. Thus, as far as the legal issue is concerned, there is no need for or advantage in class treatment.

2. Beyond that large legal issue, however, class treatment would be extraordinarily burdensome because the

eligibility of any one claimant under AS 29.89.050 is a factual matter. Each community would need to demonstrate that it had applied in each past year of the program; that its application was proper and approved; and that its expenditures were for a proper purpose. Even beyond that, additional questions of eligibility would arise because several communities on plaintiffs' list of "class members" are subject to challenge for various factual reasons.* In short, after ruling on the common legal question, the court could then be faced with trying, in the same forum, as many as 65 individual factual cases. There is one common legal question, but class status does not advance resolution of that question; and at the same time, individual factual issues will bog the court down in dozens of mini-trials which are better left to the administrative process or state courts.

3. Finally, as to the adequacy of class representation, plaintiffs misconstrue the law. It is not so much a matter of the competence of counsel as it is of whether the representative parties have the same interests as the class. Although Noatak and Circle may qualify (though Circle's status under the original AS 28.89.050 may be in doubt), there is no way Akiachak can be an adequate class representative. Akiachak is and has been a city since the program started, right through the repeal of AS 28.89.050, to the present. It is simply not an unincorporated community. Indeed, Akiachak has the weakest argument for eligibility by far of any community on plaintiffs' "list," so it cannot be considered a proper representative.

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* Their list includes four communities which are within organized boroughs and so are ineligible (*see* 1981 Inf. Op. Att'y Gen. (Nov. 18; J66-261-82); 1985 Inf. Op. Att'y Gen. (May 15; 366-447-85). It also includes eleven communities in which Natives are a minority, so the Native council's claim to be the village "government" is in serious doubt. It also includes Akiachak, which is ineligible because it is a city. And if the state is correct that a Native entity may not be a "government" outside of Indian country, we will face detailed factual disputes over virtually every one of the 65 villages on plaintiffs' list.

In summary, there are no avantages to class certification, and class status would create a morass of factual issues for the court to deal with. The motion should be denied.

DATED: February 18, 1986.

HAROLD M. BROWN
ATTORNEY GENERAL

By: Stanley T. Fischer, Ass't Att'y Gen'l
for Douglas K. Mertz
Assistant Attorney General

APPENDIX E

ATTORNEY GENERAL, STATE OF ALASKA

* * *

any of the funds, since, by its own admission, it chose not to apply for funds from the program in FY 86. Thus, the maximum amount that the appellants could claim from the undistributed funds, should they ultimately succeed on the merits, is $611. The state agrees to withhold this amount to satisfy appellants.[2]

VI

CONCLUSION

The trial court did not abuse its discretion when it denied the stay pending appeal. There is no necessity for a continuing injunction to protect the appellants. The trial court had no jurisdiction to hear the case because it concerned only state law. Finally, we offer to withhold from the disbursement the total amount to which the appellants would be en-

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[2] In the District Court, we withheld $29,939 from FY 86 funds, because that was the amount needed to satisfy the claims of all similar villages should they succeed on the merits. At that time the case was filed as a class action. The motion for class action certification was denied. (CR 16, 17). Thus, the only claimants before this court are Noatak and Circle. We made clear before the District court that if the plaintiffs succeeded on the merits, the state would treat all similarly situated villages alike; we still would do so. But to accomplish this does not require withholding appropriated funds from other communities, it merely requires funding by the legislature like any other judgment.